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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

DAN KOVACIC, Individually, and With an Interest in the Estate of Zachary Kovacic, Deceased; ELIZABETH FOX, Individually, and With an Interest in the Estate of Zachary Kovacic, Deceased; ERIN MICHELLE KOVACIC, Individually and As Next Friend of Carley Nicole Kovacic, Both With an Interest in the Estate of Zachary Kovacic, Deceased; CARLEY NICOLE KOVACIC, Minor Child With an Interest in the Estate of Zachary Kovacic, Deceased,

Petitioners,

v.

JUAN VILLARREAL, Individually, and In His Official Capacity; JOSE D. RUBIO, Individually, and in His Official Capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 8, 2011

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QUESTIONS PRESENTED

1. Whether police officers, having asserted involuntary custody and control, owed Kovacic a *DeShaney* "special relationship" duty.

2. Must a claimant point to a factually similar case within the circuit, recognizing the "special relationship" theory as a basis for liability before a police officer will have notice that his actions in violation of an individual's constitutional rights could result in waiver of his governmental immunity?

LIST OF PARTIES

Petitioners:

Dan Kovacic (father of deceased), Elizabeth Fox (mother of deceased), Erin Michelle Kovacic (wife of deceased),and Carley Nicole Kovacic (minor daughter of deceased)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners are the family of decedent, Zachary Kovacic and state that they have no parent companies or non-wholly owned subsidiaries.

The Respondents, Juan Villarreal and Jose D. Rubio, are police officers employed by the City of Laredo, Webb County, Texas.

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OPINION BELOW

The United States Court of Appeals for the Fifth Circuit issued its opinion reviewing the decision of the United States District Court, Southern District of Texas, Laredo Division on December 16, 2010 and is published at *Kovacic, et al. v. Villarreal, et al.*, 628 F.3d 209 (5th Cir. 2010). [Appx. A] Petitioners filed a Motion for Rehearing En Banc which was summarily denied on January 11, 2011. [Appx. D]

The initial appeal arose from the District Court's well reasoned denial of the Respondent's Motion for Summary Judgment on February 11, 2010. [Appx. B] Said Motion for Summary Judgment asserted the Respondent's defense of qualified immunity. Respondent's Motion for Summary Judgment was based largely on the reasoning contained within their Motion to Dismiss previously filed. [Appx. B, C] The Court granted in part and denied in part the City and the Officers' Motion to Dismiss, by dismissing all claims, including liability under the state-created danger theory, except: 1) a claim under §1983 against the Officers for a violation of Due Process under the "special relationship" theory, and 2) a claim under §1983 against the City for municipal liability due to the conduct of the Officers. [Appx. C] Said Order is dated December 22, 2009. [Appx. C]

STATEMENT OF JURISDICTION

The Court of Appeals' judgment was rendered on December 16, 2010. [Appx. A]. Petitioners' Motion for Rehearing En Banc was denied on January 11, 2011. [Appx. D] The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Substantive Due Process Clause of the United States Constitution provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" *U.S. Const. Amend. XIV §1.*

The relevant portion of 42 U.S.C. §1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. . . " *42 U.S.C. §1983.*

STATEMENT OF FACTS

The facts of this case are indeed tragic, yet simple and undisputed. On the evening of August 9, 2007, Zachary Kovacic ("Kovacic"), while in town for work, met his co-workers at Cheers Cocktail Lounge, located at 7004 San Dario Avenue, Laredo, Webb County,

Texas. [ROA 3: 2646] After a few hours of drinking at Cheers Cocktail Lounge, Kovacic became intoxicated and was escorted outside by employees of Cheers. [ROA 3: 2646 - 2647] At approximately 1:33 a.m., Laredo Police Department was called by Cheers employees and notified that there was an intoxicated person at the bar who needed to be escorted off the premises. [ROA 3: 2674 - 2675; 2718] Kovacic had been assaulted, handcuffed, and held on the premises by the employees of cheers pending arrival of the officers. Laredo Police Officers Juan Villarreal and Jose Rubio arrived to an intoxicated Kovacic who exhibited signs of slurred speech, aggressive behavior, unable to follow instructions, wanted to fight and had an odor of alcohol about him. [ROA 3: 2687] The Officers believed he was so impaired that he posed a danger to himself and others and was incapable of making clear and concise decisions for himself. [ROA 3: 2739 - 2740; 2689]. Because Kovacic was being belligerent, the Officers, under authority of law, "took him to the ground," re-handcuffed him and deposited him into the back of their locked patrol car. [ROA 3: 2686; 2692; 2722; 2741; 2776] Such actions were contrary to the repeated requests of Kovacic's friends and family to release him into their care and custody. [ROA 3: 2744] It has been determined that Zachary Kovacic had a blood alcohol level of .215% at the time of leaving Cheers. [ROA 3: 2747] At 1;56 a.m., the Officers, insisting they were taking Kovacic back to his hotel [ROA 3: 2744], drove Kovacic several miles away before unceremoniously releasing and abandoning him at the corner of Del Mar and Loop 20 on the outskirts of town at 2:08 a.m. [ROA 3: 2674, 2734 - 35, 2693 - 94] Kovacic's release was approximately 5 - 6 miles from his hotel. [ROA 3: 2742] At approximately 2:33 a.m., Kovacic, attempting to make his way home in his

intoxicated state, was hit on the roadway by an unknown hit and run driver. [ROA 3:2678; 2726 - 29; 2759; 2768 - 2772] At the time of the incident, Kovacic's blood alcohol level was noted as .205. [ROA 3: 2747] Zachary, though suffering from severe and debilitating injuries, was found alive and taken to Doctor's Hospital in Laredo, Texas, where he subsequently died from his injuries. [ROA 3: 2648]

Petitioners, all having an interest in the estate of Zachary Kovacic, filed this action against Officers Juan Villarreal and Jose Rubio and the City of Laredo. Petitioners allege the Officers deprived Zachary Kovacic of his constitutional rights and deprived him of Due Process in violation of 42 U.S.C. §1983 and that the City is liable for the constitutional violations of the Officers.

STATEMENT OF THE CASE

On December 26, 2007, Petitioners filed suit against the City of Laredo and Respondents, Officers Villarreal and Rubio for among other things, violation of 42 U.S.C. §1983. Petitioners' claims were premised on the special relationship and state-created danger theories. [ROA 1: 297 - 301]. Respondents answered and asserted their defense of qualified immunity. [ROA 1: 321 - 329, 342-349] On September 3, 2009, after substantial discovery, Respondent and the City of Laredo filed a Fed.R.Civ.P. 12(b)(6) Motion to Dismiss arguing that Petitioner had failed to state a viable constitutional claim because neither the special relationship theory nor the state-created danger had been recognized or clearly established by the Fifth Circuit. [ROA 2: 1435]. Petitioners filed a response to said Motion. [ROA 2: 1474]

By the November 4, 2009 disposition motion deadline, the court had yet to rule on Respondent's Motion to Dismiss; however, the Respondents and the City of Laredo did file their Motion for Summary Judgment. [ROA 2: 1994] The Respondents and City of Laredo alleged their qualified immunity defense and attempted to refute Petitioner's municipal liability allegations. *Id.* Petitioner filed a response with supporting evidence on November 20, 2009. [ROA 3: 2588]. On December 8, 2009, the Laredo Defendants filed a reply to the Plaintiffs' Summary Judgment response. [ROA 3: 2997]. On December 22, 2009, the district court issued an order granting in part and denying in part the Laredo Defendant's Motion to Dismiss. [Appx. C; ROA 3: 3048 - 62] The court discussed municipal liability under the Due Process clause and the applicability of the special relationship and state-created danger theories as applied to the facts in this case. [Appx. C; ROA 3: 3054 - 62]. The court dismissed the state-created danger claim, but upheld Petitioners' claims under the special relationship theory, concluding that Petitioners had satisfied the first prong of the test against qualified immunity by sufficiently alleging custody, injury and deliberate indifference. [Appx. C; ROA 3: 3057 - 58; 3060] The Court reasoned:

> As the special relationship theory was born out of the idea that a duty is created when the state places a person in a position where they cannot act for themselves (custody), the present case as alleged, and Plaintiffs' application of the theory are consistent with its origin. Precedent clearly dictates that the officers had no duty to transport Kovacic home from the bar, but once they began that undertaking and placed him in

> custody, a duty arose to account for his "safety and general well-being." *DeShaney*, 489 U.S. at 199-200. Releasing Kovacic at an arbitrary location in an intoxicated state is not, as a matter of law, sufficient to discharge that duty. A mechanical operation of law, as Defendants suggest, that relieves the Officers of their duty at the precise moment Kovacic is released, no matter the state he is released in or the circumstances he is released into, would render the duty to account for his "safety and general well-being" hollow. Such a rule would constitutionally permit a state to release someone from custody at any location, in any condition or circumstances, as long as a non-state actor ultimately caused the injury. Due Process, under the special relationship theory demands more than simply the act of release in order to discharge the duty of care that arises when custody begins. Accordingly, the fact that the injury occurred after release does not as a matter of law, require dismissal of Plaintiffs' claims." [Appx. C, p. 40a; ROA 3: 3057 - 3058]

The Court dismissed all claims except the Due Process claim against the Defendant officers under the special relationship theory and the claims against the City. [Appx. C; ROA 3: 3062].

On February 11, 2010, after a thorough review of the summary judgment evidence, the court, referencing its previous findings and rationale set forth in the Order on the Motion to Dismiss, issued its order denying the Respondents' Motion for Summary Judgment on the Petitioners remaining claims. [Appx.

B; ROA 4: 3131, 3141]. In denying their Motion, the court stated:

> "Although Defendants submit summary judgment evidence not previously considered by the Court, a thorough review of all the summary judgment evidence establishes that a factual dispute exists sufficient to defeat summary judgment. In particular, while the Officers now dispute Kovacic's level of intoxication at the time he was picked up at Cheers and dropped off at the Speedy Stop, the same officers testified in deposition that Kovacic was impaired such that he presented a danger to himself and others, if allowed to drive home. [Appx. B, p. 17a; ROA 4: 3134]

On February 18, 2010, the Officers timely filed their notice of interlocutory appeal on the grounds of qualified immunity. [ROA 4: 3151] On February 25, 2010, the district court stayed all proceedings as to all Defendants until further notice. [ROA 4: 3197]. The Fifth Circuit Court of Appeals issued its opinion on December 16, 2010. [Appx. A]. On January 11, 2011 Petitioners' Motion for Rehearing En Banc was summarily denied. [Appx. D].

REASONS FOR GRANTING PETITION

I. Whether Police Officers, Having Asserted Involuntary Custody and Control, Owed Kovacic a *DeShaney* "Special Relationship" Duty.

This case provides the Court with the opportunity to wade into the swirling, murky waters of the special relationship theory and clarify the application and

parameters of such theory. A large majority, if not all the circuits have recognized the "special relationship" theory, but they have been left to flounder on their own in determining what act triggers the application of the theory, i.e. voluntary custody v. involuntary custody v. degree of control; as well as, what duties arise and when do such duties terminate once this relationship is established. As a result, the circuits are left to flail aimlessly in their reasoning without any lifeline to guide their application of the theory. Such indecision results in patchwork jurisprudence and is unacceptable.

A. Special Relationship Exception Established

In 1989, in *DeShaney v. Winnebago County Department of Social Services*, a divided Supreme Court announced a substantive Due Process doctrine purporting (once again) to separate federal constitutional injury from private tort law, to differentiate governmental action from inaction, to distinguish negative constitutional liberties from affirmative duties, and to underline the boundary between the public and the private world. *DeShaney v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189, 195 - 96, 201, 109 S.Ct. 998, 103 L.Ed. 2d 249 (1989). The Court stated that individuals have a substantive Due Process right to be free from state occasioned bodily harm, but it is equally clear that the constitution does not, as a general rule, impose upon state officials, a duty of care to protect individuals from any and all private harms. *Id* at 196 - 197. Chief Justice Rehnquist's opinion, however, introduced two caveats into its polarized schematic; specifically, the "special relationship" exception and the "state-created danger" exception. *Id* at 199 - 200.

The special relationship exception is triggered when the State actor affirmatively exercises its power over an individual so as to restrain the individual's freedom and hold him there against his will. *Id.* Having exercised its authority and control over the person, the constitution imposes upon the State a corresponding duty to assume some responsibility for the person's safety and basic human needs. *Id.* However, the "affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expression of intent to help, but from the limitations which it has imposed on his freedom to act on his own behalf." *Id.*

The application of this ideal has been applied in a multitude of scenarios. *Estelle v. Gamble,* 429 U.S. 97, 104-05, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). (incarcerated prisoners); *DeShaney,* 489 U.S. at 201, n.9, *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289 (8th Cir. 1993) (foster care cases); *Youngberg v. Romero*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (patient at State mental hospital); and *Heflin v. Stewart Cnty.*, 958 F.2d 709, 713-14 (6th Cir. 1992) (pre-trial detainees).

B. Custody Triggers Application

The various circuits interpreting the "special relationship" exception seem to rely on two factors in determining whether a special relationship has been imposed. First, was there an involuntary custodial relationship and second, the individual acting under color of state law did so with deliberate indifference, a culpability that was the proximate cause of Plaintiff's constitutional deprivation. *See Generally, DeShaney,* 489 U.S. at 199-200; *Youngberg,* 457 U.S. at 317;

Estelle v. Gamble, 429 U.S. at 97. The constitutional deprivation arises out of this custodial relationship. The emphasis is on whether under the existing circumstances, the officers carried out the duty imposed by their custodial relationship; i.e. safeguard the restricted individual from harm.

(1) Involuntary vs. Voluntary custody

Under this theory, the Court is required to ask whether there was an involuntary or voluntary custodial relationship. To determine whether someone was "in custody" under the Fourth Amendment, a court must examine the objective circumstances surrounding the situation using the perspective of a reasonable person in the suspect's position. *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526, 1530, 128 L.Ed.2d 293 (1994) (per curiam); *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (person in custody "if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.") The Court is to consider the totality of the circumstances involved when making this determination. *California v. Beheler*, 436 U.S. 421, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (per curiam).

Several Circuits have declined to find a "special relationship" where custody was not established: *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir. 2003) (Officers' mere transport of pedestrian without more did not constitute custody and give rise to special relationship duty); *DeAnzona v. City and County of Denver*, 222 F.3d 1229, 1234 (10th Cir. 2000) ("A Plaintiff must show involuntary restraint by the

government to have a claim under special relationship theory, if there is no custodial relationship there can be no constitutional duty"); *Santamoreno v. Georgia Military College*, 147 F.3d 1337, 1341 and n.10 (11th Cir. 1998) (no duty would arise in a voluntary situation, despite representations by defendants that protection would be provided); *Randolph v. Cervantes*, 130 F.3d 727, 730-31 (5th Cir. 1997) ("The mere fact that Randolph's mental condition may have made her functionally dependent on Pine Belt and Cervantes does not transform her voluntary tenancy at Pine Hill Apartments into an involuntary confinement creating a special relationship); *Estate of Stevens v. City of Greenbay*, 105 F.3d 1169 (7th Cir. 1997) (An intoxicated *Stevens,* accepted a ride from police, was never handcuffed and child-safety locks on patrol car disengaged; therefore, no involuntary custody); *Parents of Handicapped Adult v. Wingate,* 101 F.3d 818, 824 (2d Cir. 1996) (Plaintiffs are not involuntarily institutionalized; therefore, no liability under the Due Process Clause of the Fourteenth Amendment); *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995) (Police officers did not violate *Foy's* right to substantive Due Process, since there was no restraint on his liberty that had caused him to take the trip that resulted in his death); *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987, 993 (1st Cir. 1992) ("Because the State did not commit [Plaintiff] involuntarily, it did not take an "affirmative act" of restraining his liberty, an act which may trigger a corresponding duty to assume special responsibility for his protection): *Fralkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465 (3d Cir. 1990) (State acquires an affirmative duty under the Fourteenth Amendment to provide safe conditions only where mentally retarded person is taken into custody without his consent). In

all of these cases, the Courts acknowledged the special relationship theory of liability, but found that its application and corresponding duties were triggered by involuntary custody.

C. Fifth Circuit Overlooks the Importance of the Involuntary Custodial Relationship

The Fifth Circuit tries to waive the importance of the involuntary custodial relationship by claiming it to be a mere gratuitous service without constitutional ramifications, much like a taxi cab providing a service to a paying customer. The evidence in this case conclusively establishes that Kovacic was in custody involuntarily and at the very least shows the Officers' restraint of Zachary's personal freedom. Specifically, when the Officers arrived at the bar, Zachary was "taken down and handcuffed." [ROA 3: 2686] While still handcuffed, Zachary was involuntarily placed in the back seat of Rubio's patrol car. [ROA 3: 2692] Rubio acknowledged that Zachary was placed in the back seat of his patrol car under color of law and pursuant to his authority as a Laredo Police Officer. [ROA 3: 2741] In placing Zachary in the back of the patrol car, the Officers admittedly limited Zachary's freedom to act on his own behalf. [ROA 3: 2739; 2741] In fact, the Officers turned down private aide from Zachary's friend and co-worker, Gilbert Rodriguez. [ROA 3: 2744] Such declination of help by the Officers reflects and acknowledges the Officers' custodial relationship with Zachary, i.e., the Officers determine when Zachary is released, who he is released to, and where he is released. Additionally, the Officers contacted the Webb County Jail to see if they could take him on a public intoxication charge. [ROA 3: 2688] Once the Officers drive Zachary to the outer

loop, they made the decision to remove the handcuffs and release him at the corner of Loop 20 and Del Mar. [ROA 3: 2695] Zachary had to be assisted with exiting the police car because he was incapable of doing so himself as he was handcuffed. [ROA 3: 2695] Officer Jarrell believed that in handcuffing an individual and placing him in the backseat of a locked patrol car, you are depriving that individual of his freedom to act. [ROA 3: 2776] Based on the totality of the circumstances, no reasonable person would believe that Zachary, while handcuffed and in custody, was free to leave the back seat of the locked police cruiser and assert his right to personal freedom. To opine otherwise is absurd. This is the type of restraint which triggers the special relationship theory and liability under §1983.

D. Fifth Circuit Attempts to Minimize the Constitutional Violation and the Duty Owed by Concentrating on the Lack of Custody at Time of Injury

Additionally, the Fifth Circuit's opinion tries to discount the custody issue by emphasizing that Zachary was killed 30 minutes after release from custody. The Court's rationale in the instant case completely disregards precedent and overlooks the initial act which triggers the duty, i.e. involuntary custody. The deprivation of one's rights is what triggers the special relationship and this relationship dictates the corresponding duty to be imposed, i.e. duty to safeguard the individual from harm and provide for his needs. By focusing on whether the individual is still in custody at the time the harm befalls the victim, the Court's rationale severely diminishes the value of the constitutional right to be upheld and the duty to be

imposed. Several Circuit Courts have adopted this rationale. *Riordan v. City of Joliet*, 3 F. Supp. 2d 889 (N.D. Illinois 1998) (temporary custody not enough to establish special relationship ; however, fact question as to state-created danger); *Sellers v. Baer*, 28 F.3d 895 (8th Cir. 1994) (no special relationship where park ranger removed intoxicated individual from fairgrounds and unceremoniously released him to his death). These cases seriously diminish an individual's rights as guaranteed by the Constitution. Has our view of individual freedom become so conflicted that our Due Process rights and the self-imposed duty which accompanies custody become the red-headed step-child, deserving of qualified immunity as long as the injury occurs outside the custodial relationship? More importantly, such reasoning, if not corrected, would provide perverse incentives for state officials to abandon their charges no matter the condition they were in, or the environment to which they were released all in an attempt to chase the holy grail of qualified immunity. This, most definitely, is not the desired result.

The above noted cases are in direct opposition to several cases from other circuits. *Jacobs v. Ramirez*, 400 F.3d 105 (2d Cir. 2005) (State potentially liable as special relationship imposes duty to parolee not to require him to remain in unsafe housing once released); *Lugo v. Senkowski*, 114 F. Supp. 2d 111, 115 (N.D. N.Y. 2000) (State, because of its special relationship with a parolee, has a duty to provide medical services for an outgoing prisoner who is receiving continuing treatment at the time of his release for the period of time reasonably necessary for him to obtain treatment "on his own behalf.") *Wakefield v. Thompson*, 177 F.3d 1160 (9th Cir. 1999)

(Duty to provide ongoing treatment for prisoner for limited time after release); *Davis v. Murphy*, 143 F.3d 1021 (6th Cir. 1998), cert. den'd, 525 U.S. 1093, 119 S.Ct. 851, 142 L.Ed.2d 704 (1999) (Ct. found that taking *Davis* into custody established a special relationship and corresponding duty not to abandon him on a dark roadway in an intoxicated state); and *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) (State owed special relationship duty to incapacitated woman whom they forced to drive off with an abusive, intoxicated man resulting in a one-car accident and her ultimate death). These cases, rightfully so, focus on the custodial issue as triggering the special relationship and the requisite duties to be imposed, not whether custody had terminated. Likewise, the courts in these cases recognize that the duty owed is based upon the danger perceived. Such should be the case in *Kovacic*. Knowing Kovacic was intoxicated to the extent he presented a danger to himself and others, they had a duty to safeguard him from harm once they affirmatively placed Kovacic into involuntary custody. As one can see, the various circuits are in disarray regarding the application of the special relationship theory and such indecision leads to patchwork jurisprudence, which is unacceptable in a society governed by the legal letter of the law.

II. Must a Claimant Point to a Factually Similar Case Within the Circuit, Recognizing the "Special Relationship" Theory as a Basis for Liability Before a Police Officer Will Have Notice That His Actions in Violation of an Individual's Constitutional Rights Could Result in Waiver of His Governmental Immunity?

A. Substantive Due Process Rights Clearly Established if Correctly Applied

The Fifth Circuit wholly fails to recognize the precedential value of its own cases, much less that of the U.S. Supreme Court and other circuits in deciding that the "special relationship" theory and corresponding duty were not clearly established at the time of the occurrence in August 2007. To determine whether a constitutional right was clearly established, the reviewing court should consider whether a reasonable officer would recognize that his or her conduct violated that right under the circumstances faced, and in light of the law that existed at the time. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). As the Supreme Court has explained:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question had previously been unlawful. . . but it is to say that in light of pre-existing law the unlawfulness must be apparent. *Hope v. Pelzer*, 536 U.S. 730, 739,

> 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (internal citations omitted)

In the *McClendon* case, the Fifth Circuit indicated that it supports such an analysis. *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002). The *McClendon* court reasoned:

> As a general preposition we will not rigidly define the applicable body of law in determining whether relevant legal rules were clearly established at the time of the conduct at issue. Relying solely on Fifth Circuit and Supreme Court cases, for example, would be excessively formalistic, but they will loom largest in our inquiries. In determining what the relevant law is, then, a court must necessarily exercise some discretion in determining the relevance of particular law under the facts and circumstances of each case, looking at such factors as the overall weight of authority, and the status of the courts which render substantively relevant decisions, as well as the jurisdiction of the courts that render substantively relevant decisions. *Id* at 328 (quoting *Melear v. Spears*, 862 F.2d 1177, 1185 n.8 (5th Cir. 1989).

The Supreme Court has blessed this overall weight of authority approach. *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed. 2d 818 (1999) (indicating that a consensus of cases of persuasive authority is sufficient to put a police officer on notice of the lawfulness of his actions). Thus, it is clear that

courts should look outside their circuit to sister circuits and at Supreme Court precedent in determining what constitutes clearly established law.

B. Factually Similar Case Not Necessary

Despite the Fifth Circuit's previous ruling and Supreme Court precedent, the Fifth Circuit's opinion in this case seems to suggest that "clearly established" means an identical case within the Fifth Circuit alone. This cannot be farther from the truth. In fact, courts have found that "in order to find that the law was clearly established. . . we need not find a prior case with identical, or even materially similar facts. Our task is to determine whether the pre-existing law provided the Defendants with fair warning that their conduct was unlawful." *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136 - 37 (9th Cir. 2003) (citing *Hope*, 536 U.S. at 740).

C. Special Relationship Theory Established Within the Fifth Circuit

Based on existing case law, the specific alleged conduct in this case need not have been previously and explicitly deemed unconstitutional but existing case law must have made it clear that the conduct violated constitutional norms. No right would ever be "clearly established" if courts were allowed to cast a blind eye to valuable precedent set by the Supreme Court; as well as, their own and other circuits. In this case, the special relationship theory was recognized by the *DeShaney* court based upon the following language.

> When the State by the affirmative exercise of its power so restrains an individual's liberty that it

> renders him unable to care for himself and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf. *DeShaney*, 489 U.S. at 200.

As early as 1995, the Fifth Circuit recognized the viability of the "special relationship" theory in a 1983 cause of action. *Walton v. Alexander*, 44 F.3d 1297, 1299 (5th Cir. 1995). Subsequent Fifth Circuit decisions have interpreted the phrase, "restrains one's individual liberty" to include "incarceration, institutionalization, or other similar restraint of personal liberty." *McClendon*, 305 F.3d at 324. Likewise, in *Randolph*, the court found that Defendants never took the affirmative step of restraining Randolph's liberty so that she was rendered unable to care for herself, and the Defendants never held her involuntarily against her will. *Randolph*, 130 F.3d at 730-31. As a result, no special relationship existed. *Id.* The converse of this legal argument is that had they restrained her and held her against her will, rendering her unable to care for herself, a special relationship would exist along with a duty to safeguard her from harm. *Id.* This legal precedent has been intentionally overlooked and misapplied by the Fifth Circuit in an attempt to achieve a desired result. Justice demands more.

D. Special Relationship Clearly Established Outside the Circuit

Other circuits have found the existence of a special relationship and corresponding duty in analogous situations. See *Jacobs*, 400 F.3d at 105 (State had duty to parolee not to require him to remain in unsafe housing); *Lugo*, 114 F. Supp. 2d at 115 (State had continuing duty to provide ongoing medical treatment for limited time after release), *Davis*, 143 F.3d 1021 (Officers' duty to intoxicated man arose from custodial relationship), and *Stemler* 126 F.3d at 856 (special relationship arose with detainee sufficient to impose duty on State). The *Davis* case is remarkably similar; however, the Fifth Circuit chose to gloss over the ensuing custody which triggered the State's duty. [Appx. A] Instead, the Court makes a futile attempt to distinguish this factually identical case based on the credibility of the parties, i.e. statements of Laredo police officers. Specifically, the Fifth Circuit believed that Davis' request of the Officers not to be dropped off in his intoxicated state gave rise to his cause of action under the special relationship theory; whereas, Kovacic, allegedly asked to be released at the corner of Del Mar and Loop 20. The Court seems to indicate that the officers in *Kovacic* merely granted the request of an intoxicated individual. This is a distinction without merit. First, the evidence the court relies upon for their rationale comes from the very Officers whom the District Court Judge found to be less than credible when she stated:

> "While the Officers now dispute Kovacic's level of intoxication at the time he was picked up at Cheers and dropped off at the Speedy Stop, the same Officers testified in deposition that

> Kovacic was impaired such that he presented a danger to himself and others, if allowed to drive home." [App. B, p. 17a]

The Officers in Kovacic didn't listen to an intoxicated Kovacic at Cheers, is it plausible they listened to the intoxicated Kovacic eight minutes later when they dropped him off? Secondly, this is the very same Kovacic who eight minutes earlier the officers believed was seriously impaired and incapable of making sound decisions for himself. [ROA 3: 2689; 2739 - 2740] Finally, the very language in *DeShaney* which gave rise to the special relationship theory is quoted in *Davis* as the basis for their opinion. See *DeShaney*, 489 U.S. at 200, c.f. *Davis*, 143 F.3d at 1024. The *Davis* Court merely reasons that the Officers' failure to carry out their duty made *Davis* more vulnerable. *Id.* As a result, it is clear that the constitutional right was clearly established even outside the Fifth Circuit.

E. Correct Analysis Required of Fifth Circuit

The Fifth Circuit should be required to examine with particularity the factor of each case to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights. *Hope*, 536 U.S. at 741-45 (finding that in light of binding circuit precedent, applicable state regulations, a Department of Justice report informing the state's department of corrections of the "constitutional infirmity" of handcuffing an inmate to a hitching post, and the "obvious cruelty inherent" in the practice, respondents had "fair and clear warning" that use of the hitching post in that case violated the victim's constitutional rights)." It would create perverse incentives indeed if a qualified immunity

defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no case is on the books." *McDonald v. Haskins*, 966 F.2d 292, 293 (7th Cir. 1992); see also *Hemphill v. Schott*, 141 F.3d 412, 418 (2d Cir. 1998). Where the case is one of "obvious clarity" where the Officers' conduct "lies so obviously at the very core" of what the Constitution prohibits that the unlawfulness of the conduct was readily apparent to the State actor, notwithstanding the lack of fact-specific case law on point, a right should be found to be "clearly established" even in the absence of case law. *Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1355 (11th Cir. 2002)). It requires no quantum leap in light of the Officers' custody of Kovacic and the corresponding duty to safeguard him from harm, for a reasonable fact-finder to conclude that the Officers' actions exhibit a willful disregard for the obvious risk associated with removing an intoxicated individual from his family and friends and contrary to their representations abandoning him on the outskirts of town far from the safe-haven of his hotel.

Government action that does not contravene one of the more specific guarantees of the Bill of Rights may nonetheless still violate the Due Process Clause if it "offends some principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Allbright v. Oliver*, 510 U.S. 266, 282 (1994) (citing *Medina v. California*, 505 U.S. 437, 445 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)). Less culpable conduct has been held to waive governmental immunity for violations of other constitutional rights. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (explaining in the Eighth Amendment

context, that a government official acts with "deliberate indifference" when he or she "knows of and disregards an excessive risk.") There can be no dispute that the Constitution protects citizens against a state-actor's deliberate indifference to the safety of their charge once custody has been achieved. To release their charge at will with complete disregard to his condition, his surroundings and his overall safety is absurd. Petitioners request this court correct the flawed analysis which permeates the Fifth Circuit's opinion.

CONCLUSION

Had the Fifth Circuit chose to submit itself to the authority of this Court's *DeShaney* opinion and the persuasive authorities of her sister courts, it would not be necessary for Petitioners to seek redress here. Petitioners appreciate the workload of this Court; however, the Fifth Circuit refuses to change its course. Beyond the needs of Petitioners, this case gives the Court an excellent opportunity to expand upon the "special relationship" theory and further delineate its application and parameters; thereby, creating but one standard for all circuits to follow. Petitioners respectfully request this Honorable Court grant the petition and after review resolve the conflicts by reversing the judgment of the United States Court of Appeals for the Fifth Circuit and remand the case to the District Court for further proceedings consistent with this Court's opinion and rulings.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-40208

[Filed December 16, 2010]

DAN KOVACIC, Individually, and With An Interest in the Estate of Zachary Kovacic, Deceased; ELIZABETH FOX, Individually, and With An Interest in the Estate of Zachary Kovacic, Deceased; ERIN MICHELLE KOVACIC, Individually, and As Next Friend of Carley Nicole Kovacic, Both With An Interest in the Estate of Zachary Kovacic, Deceased, CARLEY NICOLE KOVACIC, Minor Child With an Interest in the Estate of Zachary Kovacic, Deceased,	)
Plaintiffs-Appellees	)
v.	)
JUAN VILLARREAL, Individually, and In His Official Capacity; JOSE D. RUBIO, Individually, and In His Official Capacity,	)
Defendants-Appellants	)

Appeal from the United States District Court
for the Southern District of Texas

Before KING, GARWOOD, and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge.

Plaintiffs-appellees brought a 42 U.S.C. § 1983 claim against City of Laredo Police Officers Juan Villarreal and Jose D. Rubio to recover damages for the death of Zachary Kovacic. The issue on appeal is whether the defendants-appellants are entitled to summary judgment on the defense of qualified immunity. For the reasons stated below, we find that Officers Rubio and Villarreal are entitled to summary judgment and reverse the district court's order denying it.

STANDARD OF REVIEW

We review *de novo* a district court's denial of a motion for summary judgment on the basis of qualified immunity. *Flores v. City of Palacios*, 383 F.3d 391, 394 (5th Cir. 2004). Summary judgment is applicable when it is determined that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(a). A denial of a motion for summary judgment on the issue of qualified immunity is immediately appealable, to the extent that the district court's order turns on an issue of law.

Good v. Curtis, 601 F.3d 393, 397 (5th Cir. 2010).[1] Once a defendant invokes qualified immunity, the burden shifts to the plaintiff to show that the defense is not available. *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002). As we said in *Thompson v. Upshur County, Tx.*, 245 F.3d 447, 456 (5th Cir. 2001) (quoting with approval from *Pierce v. Smith*, 117 F.3d 866, 871-72 (5th Cir. 1997)):

"Where, as here, a section 1983 defendant pleads qualified immunity and shows he is a governmental official whose position involves the exercise of discretion, the plaintiff then has the burden 'to rebut this defense by establishing that the official's allegedly wrongful conduct

---

[1] The district court did find in its order denying summary judgment that there was a factual dispute sufficient to defeat summary judgment. When deciding an interlocutory appeal of a denial of qualified immunity, we do not have jurisdiction to review the genuineness of any factual disputes but can decide whether the factual disputes are material. *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000). The district court identified only one disputed fact in its order– the officers' testimony about Kovacic's level of intoxication. If the district court does not specify all the facts that it finds to be in dispute, we "conduct an analysis of the record to determine what issues of fact the district court likely considered genuine." *Id. See also, e.g., Colston v. Barnhart*, 146 F.3d 282, 285 (5th Cir. on petition for rehearing en banc), *cert. denied*, 119 S.Ct. 618 (1998); *Thompson v. Upshur County, Tx.*, 245 F.3d 447, 455-56 (5th Cir. 2001); *Manis v. Lawson*, 585 F.3d 839, 842-43 (5th Cir. 2009). After conducting such a review (and accepting, *arguendo*, plaintiffs' claims as to the evidence of Kovacic's level of intoxication), we find that there are no disputes of fact that are material to the question of whether or not the defendants are entitled to summary judgment on the basis of qualified immunity.

> violated clearly established law.' *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992). We do 'not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs.' *Id.*"

Further, where as here, a defendant moves for summary judgment and correctly points to an absence of evidence to support the plaintiff's claim on an issue as to which plaintiff would bear the burden of proof at trial, then summary judgment should be granted for the defendant unless the plaintiff produces summary judgment evidence sufficient to sustain a finding in plaintiff's favor on that issue. *Anderson v. Liberty Lobby Inc.*, 106 S.Ct. 2505, 2511 (1986); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552-53 (1986); *Johnson v. Deep East Texas Narcotics Trafficking Task Force*, 379 F.3d 293, 337 (5th Cir. 2004) (qualified immunity).

FACTS AND PROCEEDINGS BELOW

On August 9, 2007, Zachary Kovacic met several of his co-workers at the Cheers Cocktail Lounge (Cheers) in Laredo, Texas at around 9:30 p.m. Kovacic was working on a work crew in Laredo, and his wife and daughter had traveled from their home in Colorado to join him. After several hours at Cheers, Kovacic was escorted outside of the bar by Cheers employees. Kovacic was allegedly intoxicated and involved in an altercation with another man over a woman. At approximately 1:33 a.m., an employee of Cheers called the Laredo Police Department to notify them that there was an intoxicated person at the bar who needed to be escorted off of the premises. Several Laredo police officers arrived, including appellants Rubio and

Villarreal. Kovacic, who had been handcuffed by Cheers employees, was handcuffed again by the officers and placed in the back of Officer Rubio's squad car. One of the officers contacted the Webb County Jail and was told that due to overcrowding, there was not room for a person charged only with a Class C misdemeanor, which applies to the offense of public intoxication. The officers informed the friends and relatives of Kovacic who were still at Cheers that they, the officers, were going to transport Kovacic to his hotel, the Value Inn on Loop 20. At 2:08 a.m., Kovacic was unhandcuffed and released into the parking lot of an Exxon Speedy Stop gas station at the intersection of Del Mar and Loop 20. The Speedy Stop was a convenience store/gas station which was then lighted and open to the public for business, as it was 24 hours a day. It was some five to six miles from Kovacic's hotel. The officers stated in their summary judgment affidavits that Kovacic insisted that he be dropped off at the gas station, where he would call his wife at the hotel to come pick him up. The officers left the parking lot after Kovacic got out of the car. At approximately 2:33 a.m., Kovacic was hit while walking in the roadway of Loop 20, about 1/4 mile north of the Speedy Stop, by an unknown hit-and-run driver. He did not regain consciousness and subsequently died from the injuries he thus received.[2] Plaintiffs presented evidence that, as later determined, Kovacic's blood alcohol at the time he was hit was .205.

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[2] The next day or so, Kovacic's wallet was found by a third party behind a dumpster at the Speedy Stop. There was no money in it when thus found. Kovacic had cashed a several hundred dollar paycheck earlier in the day on August 9.

Plaintiffs, who all have an interest in the estate of Zachary Kovacic, filed this action against Cheers Cocktail Lounge, Officers Villarreal and Rubio, the former Laredo Chief of Police, and the City of Laredo. The original claims against appellants were under 42 U.S.C. § 1983 for false arrest, excessive force and failure to protect. The appellants filed a FED. R. CIV. P. 12(b)(6) motion to dismiss arguing that the plaintiffs had failed to state a valid constitutional claim. While their motion to dismiss was still pending before the district court, appellants filed a motion for summary judgment. The district court issued an order granting in part and denying in part the motion to dismiss. The court dismissed all claims against the officers save for the 42 U.S.C. § 1983 due process claim under the "special relationship" theory. The district court subsequently denied the appellants' motion for summary judgment. Appellants here interlocutorily appeal the denial of their motion for summary judgment.

DISCUSSION

Section 1983 provides a cause of action for persons who have been "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by the actions of a person or entity operating under color of state law. 42 U.S.C. § 1983. Qualified immunity was created to insulate government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982). To determine if a defendant is entitled to qualified immunity, this court must determine "whether the defendant's actions

were objectively unreasonable in light of clearly established law at the time of the conduct in question." *Freeman*, 483 F.3d at 410-11. In light of the Supreme Court's decision in *Pearson v. Callahan*, we are permitted to consider the question of whether a defendant is entitled to qualified immunity without determining whether or not the plaintiff's constitutional rights were violated. 129 S.Ct. 808, 821 (2009).

There is a recognized substantive due process right for individuals to be free from bodily harm caused by the state, but as a general rule, there is no constitutional duty that requires state officials to protect persons from private harms. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.* 109 S.Ct. 998, 1004 (1989). The Supreme Court in *DeShaney* did recognize that there could be exceptions to this general rule. One of these exceptions applies when there is a "special relationship" between the individual and the state. This relationship is formed "[w]hen the state, through the affirmative exercise of its powers, acts to restrain an individual's freedom to act on his own behalf 'through incarceration, institutionalization, or other similar restraint of personal liberty'." *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002) (quoting *DeShaney*, 109 S.Ct. at 1005). The state does have a constitutional duty to protect individuals in such relationship to the state from dangers, which in certain circumstances can include private violence. *McClendon*, 305 F.3d at 324.

We hold that defendants Villarreal and Rubio are entitled to qualified immunity from plaintiffs' section 1983 claim. A constitutional right is clearly established for the purposes of section 1983 only if the law is clear

enough such that "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 107 S.Ct. 3034, 3039 (1987). To determine whether state officials had "fair warning" that their conduct was unconstitutional, we consider the status of the law both in our circuit and in our sister circuits at the time of the defendants' actions. *McClendon*, 305 F.3d 314 at 329. The plaintiffs argue that a "special relationship" existed between Kovacic and the defendant officers because he had been in their custody at one point in time and thus the officers should be liable for the private violence perpetrated against him by the hit-and-run driver. Plaintiffs have not referenced a single case in either the district courts or the court of appeals of this circuit in which state actors were held liable for private harm caused to an individual after he was released from custody. In *DeShaney* itself, the Court held that the state actor at issue, a county Department of Social Services, had no duty to act because the plaintiff was no longer in the department's custody and thus his liberty to act on his own behalf was not limited by the state actor. 109 S.Ct. at 1005-06.

The plaintiffs do point to a case decided by the Sixth Circuit, *Davis v. Brady*, in which that court found that the plaintiff had a valid section 1983 claim against police officers who abandoned him in an intoxicated condition on a highway, where he was subsequently hit by a car and severely injured. 143 F.3d 1021 (6th Cir. 1998). However, the facts in *Davis* distinguish it from the instant case. The plaintiff in *Davis* testified that he asked the officers not to be released on the road but the officers threw him out of the car in order to "teach [him] a lesson." *Id.* at 1023. As stated above, once a defendant invokes qualified

immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to qualified immunity. The plaintiffs in this case have not presented any evidence to contradict Rubio's and Villarreal's affidavits that Kovacic demanded to be let out of the squad car in the Speedy Stop parking lot and thus was released from their custody at his request. There is also no evidence in the record that shows that the officers had any reason to think that Kovacic likely would not call his wife to pick him up as he indicated, or that the officers were aware that Kovacic was lacking the resources to secure another way home.

Additionally, the Sixth Circuit recognizes the "state-created danger" theory of section 1983 liability and references it in its opinion in *Davis*. *Id.* at 1025. A number of courts have interpreted *DeShaney* to allow a second exception to the rule against state liability for violence committed by private actors in situations where "the state actor played an affirmative role in creating or exacerbating a dangerous situation that led to the individual's injury." *McClendon*, 305 F.3d at 324. The Fifth Circuit has not adopted the "state-created danger" theory of liability. *See Bustos v. Martini Club Inc.*, 599 F.3d 458, 466 (5th Cir. 2010); *Rios v. City of Del Rio*, 444 F.3d 417, 422 (5th Cir. 2006). As such, the analysis in *Davis* pertaining to whether the police officers put the victim in a more vulnerable position than he would have been otherwise is not applicable in this circuit and would not put the officers on reasonable notice of a constitutional violation.

Plaintiffs cite to *Walton v. Alexander* as their sole support in the Fifth Circuit for the "special relationship" theory as applied to this situation. 44

F.3d 1297 (5th Cir. 1995). In *Walton*, this court only specifically holds that it adopts the special relationship theory outlined in *DeShaney*. It does not provide any support for expanding an officer's duty under section 1983 past the point in time when the victim is no longer in the officer's custody. Given the lack of any contrary precedent, we hold that reasonable, competent officers would not conclude that it would violate Kovacic's constitutional rights to honor his request that he be let out at the Speedy Stop. No such constitutional law was then, or is now, clearly established. The defendant officers are entitled to qualified immunity, and the district court's denial of their motion for summary judgment is reversed.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's order denying the officers' motion for summary judgment on plaintiffs' section 1983 claim.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-40208
D.C. Docket No. 5:09-CV-2

[Filed December 17, 2010]

DAN KOVACIC, Individually, and With An Interest in the Estate of Zachary Kovacic, Deceased; ELIZABETH FOX, Individually, and With An Interest in the Estate of Zachary Kovacic, Deceased; ERIN MICHELLE KOVACIC, Individually, and As Next Friend of Carley Nicole Kovacic, Both With An Interest in the Estate of Zachary Kovacic, Deceased, CARLEY NICOLE KOVACIC, Minor Child With an Interest in the Estate of Zachary Kovacic, Deceased, Plaintiffs-Appellees	)
v.	)
JUAN VILLARREAL, Individually, and In His Official Capacity; JOSE D. RUBIO, Individually, and In His Official Capacity, Defendants-Appellants	)

Appeal from the United States District Court
for the Southern District of Texas, Laredo

Before KING, GARWOOD, and DAVIS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the order of the District Court appealed from is reversed.

IT IS FURTHER ORDERED that appellees pay to appellants the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX B

O

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CIVIL ACTION NO. L-09-2

[Filed February 11, 2010]

DAN KOVACIC, *et al*,	)
	)
Plaintiffs,	)
VS.	)
	)
LARRY BROWN ENTERPRISES, L.L.C., D/B/A/CHEERS COCKTAILS, *et al*,	)
	)
Defendants.	)
	)

ORDER

On September 3, 2009, Defendants City of Laredo ("the City"), Officer Jose D. Rubio, and Officer Juan Villarreal ("the Officers") submitted a motion to dismiss all claims against them for failure to state a

claim. [Dkt. No. 68].[1] While that motion was pending, the City and the Officers additionally submitted the instant motion for summary judgment, based largely on the same reasoning as the motion to dismiss. [Dkt. No. 89]. The Court then granted in part and denied in part the City and the Officers' motion to dismiss, by dismissing all claims except: (1) a claim under § 1983 against the Officers for a violation of due process under the special relationship theory, and (2) a claim under § 1983 against the City for municipal liability due to the conduct of the Officers. [Dkt. No. 104]. The Court now considers the City and the Officers' motion for summary judgment on these two remaining claims.

I. BACKGROUND

The following facts are taken from Plaintiff's Fourth Amended Complaint, [Dkt. No. 78], and for the purposes of this summary judgment, are presumed to be true: on the evening of August 9, 2007, Zachary Kovacic ("Kovacic"), while in town for work, met his co-workers at Cheers Cocktail Lounge, located at 7004 San Dario Ave., Laredo, TX. [Dkt. No. 78 at 7]. After a few hours of drinking at Cheers Cocktail Lounge, Kovacic had become intoxicated and was escorted outside by employees of Cheers. [*Id.* at 8]. Once outside, he was "involuntarily handcuffed" by the employees of Cheers. [*Id.*]. "Thereafter, at approximately 1:33 a.m., Laredo Police Department officers were called and notified by Cheers's employees that there was an intoxicated patron at the bar that

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[1] "Dkt. No." refers to the docket number entry for the Court's electronic filing system. The Court will cite to the docket number entries rather than the title of each filing.

needed to be escorted off the premises." [*Id.*]. Kovacic was held outside the bar until the police arrived. [*Id.*]. Laredo Police Officers Juan Villarreal and Jose Rubio arrived and, "contrary to the repeated requests of [Kovacic's] family and co-workers to release him into their care," placed Kovacic in the back of their patrol car and removed him from the premises. [*Id.*]. "[I]t has been determined that Zachary Kovacic had a blood alcohol level of .215% at the time of leaving Cheers." [*Id.*]. The officers then drove Kovacic "several miles away" and "unceremoniously released" Kovacic at the "intersection of Del Mar and Loop 20 at approximately 2:08 a.m." [*Id.* at 9]. This location was "approximately [five] miles from the [hotel] where he was staying with his wife and child." [*Id.*]. At about 2:33 a.m., Kovacic was hit on the roadway by an unknown hit-and-run driver. [*Id.*]. Kovacic was found alive, despite "severe, debilitating injuries," and was taken to Doctor's Hospital in Laredo, TX. [*Id.*]. "Upon arrival, medical treatment was rendered and a blood test was performed which indicated a blood alcohol level of .227% (serum calculation)." [*Id.*]. Kovacic did not recover, and subsequently died from his injuries. [*Id.*].

Plaintiffs, all having an interest in the estate of Zachary Kovacic, filed this action against: Larry Brown Enterprises, LLC doing business as "Cheers Cocktails"; Doug Mercer, individually and doing business as "Cheers Cocktail Lounge"; Officers Juan Villarreal and Jose Rubio, both individually and in their official capacities; then Chief of Police Agustin Dovalina, both individually and in his official capacity; and the City of Laredo, TX. [*Id.* at 1-3]. Chief of Police Agustin Dovalina was subsequently dismissed as a defendant in his personal and official capacities. [Dkt. Nos. 33, 67]. Plaintiffs' Complaint alleges multiple

causes of action, which can be divided into claims against Larry Brown Enterprises and Doug Mercer (collectively "Cheers"), claims against Officer Villarreal and Officer Rubio ("the Officers"), and claims against the City of Laredo ("the City").

As noted *supra*, the only remaining claim against the Officers is a § 1983 claim for violation of due process under the special relationship theory, and the only remaining claim against the City is a § 1983 claim for municipal liability due to the conduct of the Officers. [Dkt. No. 104]. The Officers and the City ("Defendants") move for summary judgment on these two remaining claims, and each will be discussed in turn.

II. DISCUSSION

Summary judgment is appropriate when the "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of Law." FED. R. CIV. P. 56(c). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Finally, all facts and evidence must be taken in the light most favorable to the non-moving party. *United Fire & Cas. Co. v. Hixson Bros. Inc.*, 453 F.3d 283, 285 (5th Cir. 2006). Defendants' motion for summary judgment will be evaluated under this standard.

A. Violation of Due Process -- Special Relationship Theory

Defendants' motion for summary judgment on this claim is based on the argument that no special relationship existed after Kovacic was released from custody, and also that the Officers are entitled to qualified immunity. [Dkt. No. 89 at 5]. These are the same arguments put forth in their motion to dismiss for failure to state a claim. [Dkt. No. 68]. The Court resolved these arguments as a matter of law in its Order granting in part and denying in part Defendants' motion to dismiss. [Dkt. No. 104].

Having determined that Plaintiffs' allegations as set forth in their Fourth Amended Complaint were sufficient to state a claim upon which relief may be granted, the Court now considers whether the summary judgment evidence raises a fact issue sufficient to defeat Defendants' instant motion. Although Defendants submit summary judgment evidence not previously considered by the Court, a thorough review of all the summary judgment evidence establishes that a factual dispute exists, sufficient to defeat summary judgment. In particular, while the Officers now dispute Kovacic's level of intoxication at the time he was picked up at Cheers and dropped off at the Speedy Stop,[2] the same Officers testified in deposition that Kovacic was impaired such that he presented a danger, to himself and others, if allowed to

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[2] In his declaration, Officer Rubio minimizes Kovacic's level of intoxication, stating that he "did not notice any slurred speech," that Kovacic was "not falling down," and "steady on his feet." [Dkt. No. 89, Exhibit A].

drive home. [Dkt. No. 91, Exhibit D at 141-42; Exhibit C at 44]. Accordingly, Defendants' motion for summary judgment on the § 1983 claim against the Officers for a violation of due process based on the special relationship theory is DENIED.

B. Municipal Liability

Defendants also move for summary judgment on the § 1983 municipal liability claim against the City, based on the argument that Plaintiffs cannot show that a "policy, practice or custom adopted with conscious indifference was the moving force behind such [a constitutional] violation." [Dkt. No. 98 at 9].

"It is well-established that a city is not liable under § 1983 on the theory of respondeat superior" for the actions of its employees. *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (citing *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978)). "To establish municipal liability under § 1983, a plaintiff must show that (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Peterson*, 588 F.3d at 847 (citing *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir. 2001)). Defendants dispute Plaintiffs' ability to establish an official policy, that such a policy was adopted with "deliberate indifference," and that it was promulgated by the "policymaker." [Dkt. No. 89 at 8; Dkt. No. 98 at n. 4]

i. Official Policy

With respect to the first element of a municipal liability claim, the Fifth Circuit has clarified:

> [T]he court *en banc* has agreed on the following formulation to govern the imposition of municipal liability:
>
> A municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy.
>
> Official policy is:
>
> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984) (en banc). Plaintiffs do not allege an official policy that has been officially adopted, as defined by the first formulation in *Webster*. Instead, Plaintiffs allege an official policy under the second formulation:

an informal, widespread practice of allowing police officers to release intoxicated individuals "when they knew them to be a danger to themselves or others." [Dkt. No. 91 at 30].

To dispute this allegation of an informal policy, Defendants submit the deposition of Assistant Police Chief Gilberto L. Navarro. [Dkt. No. 89 at 8; Exhibit C]. Navarro states that

> [t]he Police Department has not authorized, encouraged, sanctioned or condoned any custom or informal practice that gives police officers discretion to release persons arrested for public intoxication when the police officer knows that such conduct creates or increases a substantial risk of serious injury to the suspect being released or to others.

[Declaration of Gilberto L. Navarro, Dkt. No. 89, Exhibit C at ¶ 11]. However, Navarro goes on to state that "Webb County's refusal to accept public intoxication suspects has increased the incidences of intoxicated persons being released by police officers." [*Id.*]. Thus, after what seems to be a complete refutation of Plaintiffs' allegations, Navarro also affirms the fact that police officers have been releasing intoxicated individuals, and at an increasing rate.

As further evidence, Defendants attach to the deposition of Navarro the "only policy of the police department that refers specifically to the offense of 'public intoxication,'" which states:

> A. Persons who are intoxicated and found in a public place, and who, by reason of their

intoxication, are a danger to themselves or others should be arrested for public intoxication.

B. The arrest report will reflect the probable cause to believe the person is intoxicated.

C. If a traffic violator is stopped, but not arrested and has a passenger who is intoxicated, but not a danger to himself and others, then the intoxicated person will not be arrested for public intoxication.

D. Persons found to be intoxicated and circumstances indicate they were operating a motor vehicle, but no fact witness exists to place them driving, should be filed as Public Intoxication.

[Dkt. No. 89, Exhibit C; Attachment 1, "3.19 Intoxicated Persons-P.C. 42.08"]. This written policy clearly dictates that anyone intoxicated in a public place that is a danger to themselves or others is to be arrested. This official mandate is in direct contrast to the alleged "informal policy" of releasing such intoxicated individuals. Beyond the declaration of Navarro and this written policy, Defendants point to a lack of other reports of citizens being injured as a result of police officers releasing public intoxication suspects as evidence that no such policy exists. [Dkt. No. 98 at 8].

In response to Defendants' motion for summary judgment, and as evidence of an informal policy of releasing intoxicated individuals, Plaintiffs submit the deposition testimony of six Laredo Police Officers, each

describing their understanding of how they are to treat intoxicated individuals. [Dkt. No. 91 at 34-37]. Each officer gave a variety of options when dealing with intoxicated persons, and answers included: arrest the individual, take them home and leave them with someone over the age of 18, cite the individual and release them, take them to a treatment facility, and drop them off where the intoxicated individual requested. [*Id.*; Dkt. No. 91, Exhibit C at 44-46; Exhibit D at 31-33; Exhibit K at 50-51; Exhibit M at 32; Exhibit P at 56-57; Exhibit Q at 51]. Officer Adrian Rodriguez also stated that "each officer has his own way of handling things." [Dkt. No. 91, Exhibit M, at 35].

Given this competing evidence, Defendants have failed to carry their burden at the summary judgment stage. The deposition testimony of one officer is not sufficient, especially when that officer refers to the fact that the jail's refusal to accept intoxication suspects "has increased the incidences of intoxicated persons being released by police officers." [Declaration of Gilberto L. Navarro, Dkt. No. 89, Exhibit C at ¶ 11]. Also, the production of a written policy describing procedure for intoxicated persons is not overly persuasive, given the nature of the claim of an informal policy, and the deposition testimony of various officers that they do not follow the written policy. The lack of reports of similar instances is not as persuasive as it may be in other cases concerning an allegation of a pattern or custom amounting to an official policy, as Plaintiffs do not try to prove their case in this circumstantial manner or by statistics, but rather through the direct testimony of the officers themselves. A plaintiff should not be forced to wait for the accumulation of constitutional violations to

statistically suggest a policy, when evidence of the policy can be found in the testimony of those who enforce it. The Court concludes that when considering all of this evidence, a reasonable jury may find the existence of an informal policy, pattern, or custom of allowing police officers to release intoxicated individuals, despite the written policy to the contrary. Accordingly, Defendants motion for summary judgment based on the argument that Plaintiffs cannot establish the existence of an "official policy" is DENIED.

ii. Deliberate Indifference

Defendants argue that even if the Court finds a constitutional violation and policy, Plaintiffs cannot show that the policy was "adopted with conscious indifference." [Dkt. No. 89 at 9]. To establish § 1983 municipal liability, a Plaintiff is required to show not only a policy that resulted in a constitutional violation, but also that the policy "itself is unconstitutional or, if not, must have been adopted 'with deliberate indifference to the known or obvious fact that such constitutional violations would result.'" *James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009) (quoting *Johnson v. Deep East Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004)). "Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it 'must amount to an intentional choice, not merely an unintentionally negligent oversight.'" *Id.* at 617-18 (quoting *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992).

Thus, in this case, Plaintiffs must show that the policy of allowing police officers to release intoxicated

individuals when they knew them to be a danger to themselves or others was adopted with a conscious disregard to its "plainly obvious consequence," a violation of Kovacic's constitutional rights. *Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 412 (1997). While Defendants recite the deliberate indifference standard in their motion, they fail to analyze the instant case under the standard. In fact, Defendants offer only one conclusory sentence: "Plaintiffs cannot show that a policy, practice or custom adopted with conscious indifference was the moving force behind such violation." [Dkt. No. 89 at 9]. The nature of the alleged policy itself, with the language "known to be a danger" already incorporated, is enough to suggest that it was adopted with disregard to its obvious consequences. And with all inferences in favor of the Plaintiff at this stage, the Court holds that a reasonable jury may find that the policy was adopted with the deliberate indifference required for § 1983 municipal liability. Accordingly, Defendants motion for summary judgment based the "deliberate indifference" standard is DENIED.

iii. Policymaker

In a footnote in their reply, Defendants also dispute that then Chief of Police Agustin Dovalina was a "policymaker" within the meaning of the second element of § 1983 municipal liability. [Dkt. No. 98 at n.4]. The Supreme Court has held that

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers *or by those*

> *whose edicts or acts may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. Dept. of Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978) (emphasis added). Defendants contend that since Dovalina's authority to issue "general orders" was ultimately reviewable by the City Manager, he does not qualify as a "policymaker." [Dkt. No. 98 at n.4]. The Laredo Police Department Rules and Regulation state: "the Chief shall have the exclusive right to establish, rescind or modify departmental rules and regulations while such contract is in effect, subject to review by the City Manager." [Dkt. No. 91 at 33; Exhibit N at 3]. However, this is not the only written grant of authority to the Chief of Police. The General Order Manual states: "[t]he Chief of Police shall be the sole authority to issue General Orders" and "Special Orders shall be issued only by the Chief of Police." [Dkt. No. 91 at 33; Exhibit O at 3-4].

Given Defendants' insubstantial summary judgment evidence, reflected by the treatment of the issue in a footnote of its reply, [Dkt. No. 98 at n.4], as well as the grants of authority in the General Order Manual, the Court finds that a reasonable jury could conclude that Police Chief Agustin Dovalina was the "policymaker" for the Laredo Police Department, that his "edicts or acts may fairly be said to represent official policy" as described in *Monell*. Indeed, courts have routinely held chiefs of police to be "law enforcement policymakers for the purposes of municipal liability under § 1983." *Kincheloe v. Caudle*, 2009 WL 3381047, at *18 (W.D. Tex. Oct. 16, 2009)

(citing *Fraire v. City of Arlington,* 957 F.2d 1268, 1279 n.45 (5th Cir.) (finding that the chief of police is the principal policy maker for the Arlington Police Department), *cert. denied,* 506 U.S. 973 (1992); *Zarnow v. City of Wichita Falls,* 2009 WL 481884, at *5 (N.D. Tex. Feb. 25, 2009) (finding that chief of police was potential final policy maker for City of Wichita Falls for the purposes of § 1983 liability); *Williams v. City of Amory,* 2006 WL 1984596, at *4 (N.D. Miss. July 12, 2006) (finding that police chief was chief official law enforcement policymaker for City of Amory, Mississippi); *Redd v. City of Odessa,* 2001 WL 681588, at *11 (W.D. Tex. Mar. 6, 2001) (concluding that chief of police is final policy maker for the Odessa Police Department)). Accordingly, to the extent that Defendants seek summary judgment on the basis that Police Chief Agustin Dovalina was not a policymaker for the purposes of § 1983 municipal liability, the same is DENIED.

III. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment, [Dkt. No. 89], is **DENIED** in its entirety. As a result, Plaintiffs' claims for a due process violation against the Officers and for § 1983 municipal liability against the City remain.

IT IS SO ORDERED.

Done this 11th day of February, 2010, in Laredo, TX.

/s/ M. Alvarez
Micaela Alvarez
UNITED STATES DISTRICT JUDGE

TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT.

APPENDIX C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CIVIL ACTION NO. L-09-2

[Filed December 22, 2009]

DAN KOVACIC, *et al*,	)
	)
Plaintiffs,	)
VS.	)
	)
LARRY BROWN ENTERPRISES, L.L.C., D/B/A/CHEERS COCKTAILS, *et al*,	)
	)
Defendants.	)
	)

ORDER

On September 3, 2009, Defendants City of Laredo, Juan Villarreal, and Jose Rubio ("Defendants") filed a Motion to Dismiss Plaintiffs' Amended Complaint for failure to state a claim on which relief can be granted. [Dkt. No. 68].[1] After careful consideration of

[1] While Defendants' Motion to Dismiss, [Dkt. No. 68], references Plaintiffs' Fourth Amended Complaint as docket number 52, that

Defendants' motion, the contents of the Complaint, and the applicable law, the Court GRANTS in part and DENIES in part Defendants' Motion.

I. BACKGROUND

The following facts are taken from Plaintiff's Fourth Amended Complaint, [Dkt. No. 78]: On the evening of August 9, 2007, Zachary Kovacic ("Kovacic"), while in Laredo, Texas, for work, met his co-workers at Cheers Cocktail Lounge ("Cheers"), located at 7004 San Dario Ave., Laredo, Texas. [Dkt. No. 78 at 7]. After a few hours of drinking, Kovacic had become intoxicated and was escorted outside by employees of Cheers. [*Id.* at 8]. "Thereafter, at approximately 1:33 a.m., Laredo Police Department officers were called and notified by Cheers' employees that there was an intoxicated patron at the bar that needed to be escorted off the premises." [*Id.*].

After Laredo Police Officers Juan Villarreal and Jose Rubio arrived, "knowing that Zachary was a danger to himself and others . . . and contrary to the repeated requests of his family and co-workers to release him into their care," they placed him in the back of their patrol car and removed him from the premises. [*Id.*]. Plaintiffs also aver that "it has been determined that Zachary Kovacic had a blood alcohol level of .215% at the time of leaving Cheers." [*Id.*].

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entry has been stricken from the record as it was filed without obtaining leave from the Court. [Dkt. No. 61]. Plaintiffs have subsequently obtained leave to file their Fourth Amended Complaint, [Dkt. No. 76], and refiled it as document number 78.

The officers then drove Kovacic "several miles away" and "unceremoniously released" Kovacic at the "darkened intersection of Del Mar and Loop 20 at approximately 2:08 a.m.." [*Id.* at 9]. This location was "approximately 1.5 miles from the Value Inn where he was staying with his wife and child." [*Id.*]. At about 2:33 a.m., Kovacic was hit on the roadway by an unknown hit-and-run driver. [*Id.*]. Kovacic was found alive, despite "severe, debilitating injuries," and was taken to Doctor's Hospital in Laredo, TX. [*Id.*] "Upon arrival, medical treatment was rendered and a blood test was performed which indicated a blood alcohol level of .227% (serum calculation)." [*Id.*]. Kovacic did not recover, and subsequently died from his injuries. [*Id.*].

Plaintiffs, all having an interest in the estate of Zachary Kovacic, filed this action against: Larry Brown Enterprises, doing business as "Cheers Cocktails"; Doug Mercer, individually and doing business as "Cheers Cocktail Lounge"; Officers Juan Villarreal and Jose Rubio, both individually and in their official capacities; then Chief of Police Agustin Dovalina, both individually and in his official capacity; and the City of Laredo, TX. [*Id.* at 1-3]. Chief of Police Agustin Dovalina has been dismissed as a defendant in his personal and official capacities. [Dkt. Nos. 33, 67]. Plaintiffs' Complaint alleges multiple causes of action, which can be divided into claims against Larry Brown Enterprises and Doug Mercer (collectively "Cheers"), claims against Officer Villarreal and Officer Rubio (collectively "the Officers"), and claims against the City of Laredo ("the City").

Against Cheers, Plaintiffs allege: (1) violation of the Texas Dram Shop Act; (2) assault and battery; (3) false

imprisonment; and (4) negligence. [Dkt. No. 78 at 9-15]. Against the Officers and the City, Plaintiffs allege that the Officers deprived Zachary Kovacic of his constitutional rights against unreasonable seizure and denied him of Due Process in violation of 42 U.S.C. § 1983, and that the City is liable for the constitutional violations of the Officers. [*Id.* at 15-26]. In the instant motion, the Officers and the City move to dismiss all the claims against them under Federal Rule of Civil Procedure 12(b)(6), on the premise that the Officers are protected under the doctrine of qualified immunity, and that without a constitutional claim against the Officers, the derivative claim against the City must also be dismissed. [Dkt. No. 72 at 1-2].

II. DISCUSSION

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must state " a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). For a complaint to withstand a Rule 12(b)(6) motion to dismiss, it "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* A complaint meets this requirement when it contains facts that allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* When evaluating a complaint against a 12(b)(6) motion, the Supreme Court in *Iqbal* further clarified:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief."

Id. at 1949-50 (citing FED. R. CIV. P. 8(a)(2)). After recognizing the applicable standards set out in *Iqbal* and *Twombly*, the Court now turns to the merits of Defendants' motion.

A. Qualified Immunity

Defendants' main ground for dismissal is based on the premise that the Officers are protected from suit under the doctrine of qualified immunity. [Dkt. No. 68 at 5]. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009) (quoting *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009)). The qualified immunity doctrine developed in order to balance the need for vindication of constitu-

tional guarantees against the social cost of litigation which would inhibit law enforcement officials from carrying out their duties due to fear of personal monetary liability. *Anderson v. Creighton,* 483 U.S. 635, 638 (1987). To be clear, a defense of qualified immunity is only applicable to claims against officers in their *individual* capacity, as claims against officers in an official capacity are treated as claims against the municipality, and municipalities are not entitled to qualified immunity. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("[O]fficials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law.")

After a defendant invokes the affirmative defense of qualified immunity, the burden shifts to the plaintiff, who must demonstrate its inapplicability. *Club Retro,* 568 F.3d at 194. To meet this burden, the Plaintiff must "satisfy a two-prong test." *Id.* (citing *Atteberry v. Nocona Gen. Hosp.,* 430 F.3d 245, 253 (5th Cir.2005)). First, a plaintiff must allege that "defendants committed a constitutional violation under current law." *Id.* Second, a plaintiff must allege that "defendants actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of." *Id.* The Court must apply this test to each of the alleged constitutional violations by the Officers in the complaint: (1) that the Officers "detain[ed] and confin[ed] Zachary Kovacic in violation of the Fourth Amendment and its 'reasonableness' standard;" and (2) that the Officers violated Kovacic's Fourteenth Amendment right to Due Process under the "special relationship" and "state-created danger" theories. [Dkt. No. 78 at 16, 21].

i. Fourth Amendment - Unreasonable Seizure/Excessive Force

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. CONST. amend. IV. A person is "seized" by police officers "and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement, through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal citations omitted). As to what constitutes a "reasonable" seizure, the Supreme Court has explained: "[i]n a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence . . . [t]he arrest is constitutionally reasonable." *Virginia v. Moore*, 128 S.Ct. 1598, 1604 (2008).

The Complaint alleges facts sufficient to support the claim that Kovacic was "seized" within the meaning of the Constitution, in that the Officers handcuffed him, placed him in the back of the police car, and removed him from the premises. [Dkt. No. 78 at 8]. However, nowhere does the complaint allege facts sufficient to support a claim that this seizure was "unreasonable," or that excessive force was used. Taking the facts of the Complaint as true, the Officers "were called and notified that there was an intoxicated patron at the bar that needed to be escorted off the premises." [Dkt. No. 78 at 8]. The Complaint also alleges that "Kovacic had a blood alcohol level of .215% at the time of leaving Cheers" and that "Zachary was obviously intoxicated to the extent that he was both mentally and physically impaired and to the extent

[that] he presented a clear danger to himself and others." [Dkt. No. 78 at 8-9]. Indeed, the facts contained in the complaint itself demonstrate that Kovacic's seizure was *reasonable*. Without going beyond the bare assertion that Kovacic's arrest was in violation of the Fourth Amendment, and in light of the fact that the complaint demonstrates the reasonableness of the same, Plaintiffs have not properly "alleged" this constitutional violation under the pleading requirements of *Iqbal / Twombly*.

Were it simply a matter of pleading, the Court might give Plaintiffs opportunity to correct this deficiency. *See Schultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995) ("[T]he court may, in its discretion, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity."). But when the facts necessary to correct the deficiency are in such stark opposition to the facts of Kovacic's impairment which permeate the complaint and are necessary to support Plaintiffs other claims against the Officers and the City, such an opportunity would prove futile. Thus, by not properly alleging this constitutional violation, Plaintiffs fail the first prong of the test against qualified immunity for the claims of unreasonable search, seizure and excessive force. As a result, the Officers are entitled to qualified immunity from the claim that they violated the Fourth Amendment by "detaining and confining" Kovacic.

Plaintiffs also briefly allege a violation of the right to privacy, but allege no facts to support the same. A thorough review of the complaint fails to disclose any facts sufficient to state a claim for relief on this basis. Accordingly, the Officers are also entitled to qualified

immunity from the claim that they violated Kovacic's right to privacy.

ii. Due Process

The Due Process Clause of the Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. "Under traditional notions of Due Process, the fourteenth amendment was 'intended to secure the individual from the arbitrary exercise of the powers of government' which resulted in 'grievous losses' for the individual." *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir. 1990) (quoting *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 109 (1989)). As a general rule, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 195 (1989). However, certain exceptions to this rule have been acknowledged by the Supreme Court and the Fifth Circuit, including the "special relationship" theory and the "state-created danger" theory.

Plaintiffs claim that Kovacic's Fourteenth Amendment Due Process rights to "life, liberty, freedom, [and] bodily integrity" were violated by the actions of the Officers. [Dkt. No. 78 at 23]. It is undisputed that the unknown hit-and-run driver was a private actor and that the impact with the vehicle was responsible for the injuries that caused Kovacic's death. Due to this fact, Plaintiffs' claims for violations of due process can only stand under the two exceptions

to the rule against state liability for injuries caused by private actors.

a. Special Relationship

In *DeShaney*, the Supreme Court held that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney*, 489 U.S. at 199-200. The Supreme Court explained:

> The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - *e.g.*, food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 200. The Fifth Circuit has construed the Supreme Court's use of the term "custody" in this sense to mean "incarceration, institutionalization, or other similar restraint of personal liberty," and has stated that it is this restraint, not the State's failure to act, that creates a "special relationship" and invokes the protection of the Due Process Clause. *Walton v. Alexander*, 44 F.3d 1297, 1303 (5th Cir. 1995) (*en banc*)

(quoting *DeShaney*, 489 U.S. at 200). "In order to state a claim under the special relationship theory, the plaintiff must demonstrate that the state official acted with culpability beyond mere negligence, which the Supreme Court has termed 'deliberate indifference.'" *Doe v. San Antonio Indep. Sch. Dist.*, 197 Fed.Appx. 296, 300 (5th Cir. 2006).

Plaintiffs allege that Kovacic was handcuffed, placed in the back of a police car, and transported against his will, which clearly meets the "custody" requirement of *DeShaney* and *Walton*. Defendants do not dispute that Kovacic was at one time in custody, but contend that because Kovacic was not in the custody of the Officers at the time he was struck by the vehicle, the special relationship theory does not apply. [Dkt. No. 68 at 4]. To help analyze this contention, a closer review of the facts of *DeShaney* is beneficial.

The Supreme Court in *DeShaney* dealt with a similar situation of injury after release as a violation of Due Process. *DeShaney*, 489 U.S. at 193-4. Joshua DeShaney was a four year old boy who lived with his father. *Id.* at 191. After various reports of child abuse, Joshua was admitted to the hospital with multiple bruises and abrasions. *Id.* at 192. The Department of Social Services immediately obtained an order from a Wisconsin juvenile court which placed Joshua in the temporary custody of the hospital. *Id.* After three days, the state decided there was not enough evidence of child abuse to retain custody of Joshua, and released him back to his father. *Id.* After almost a year of investigation, subsequent trips to the emergency room, and no action to remove Joshua from his father's custody by the Department of Social Services, Joshua's father beat him into a life-threatening coma which

resulted in a severe mental disability. *Id.* at 193. Joshua's mother brought a claim against the County and various social workers under § 1983, alleging that Joshua had been deprived of liberty without due process of law, in violation of the Fourteenth Amendment. The Supreme Court noted that Joshua's injuries occurred at the hands of the father, who was a private actor. *Id.* at 201. However, this did not end the analysis, as the Supreme Court went on to state that:

> While the State may have been aware of the dangers that Joshua faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them.* That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, *it placed him in no worse position than that in which he would have been had it not acted at all.*

Id. (emphasis added). The above language has given rise to the "state-created danger" theory, discussed *infra,* which is not recognized in the Fifth Circuit. See *infra*, II.A.ii.b.. Nonetheless, the Supreme Court's acknowledgement of these factors in the context of the special relationship theory must be given due consideration.

Thus, while Defendants are correct in their assertion that Kovacic was ultimately killed by the acts of a private actor, the above language from *DeShaney* suggests that the Supreme Court recognized that this fact does not render a claim meritless. In this case, the Officers *did* render Kovacic "more

vulnerable" by transporting him from the bar to the gas station and releasing him in such a state, and they *did* place him in a "worse position than that in which he would have been had [they] not acted at all," as he had friends and relatives at the bar who could have looked after him. While this Court is wary of expanding the doctrine of "special relationship" due process beyond precedent, the above-quoted language from the Supreme Court and the nature of the right to be protected by the theory itself suggest that current precedent provides room for Plaintiff's claim.

As the special relationship theory was born out of the idea that a duty is created when the state places a person in a position where they cannot act for themselves (custody), the present case, as alleged, and Plaintiffs' application of the theory are consistent with its origin. Precedent clearly dictates that the Officers had no duty to transport Kovacic home from the bar, but once they began that undertaking and placed him in custody, a duty arose to account for his "safety and general well-being." *DeShaney*, 489 U.S. at 199-200. Releasing Kovacic at an arbitrary location in an intoxicated state is not, as a matter of law, sufficient to discharge that duty. A mechanical operation of law, as Defendants suggest, that relieves the Officers of their duty at the precise moment Kovacic is released, no matter the state he is released in or the circumstances he is released into, would render the duty to account for his "safety and general well-being" hollow. Such a rule would constitutionally permit a state to release someone from custody at any location, in any condition or circumstances, as long as a non-state actor ultimately caused the injury. Due Process under the special relationship theory demands more than simply the act of release in order to discharge the

duty of care that arises when custody begins. Accordingly, the fact that the injury occurred after release does not, as a matter of law, require dismissal of Plaintiffs' claims.

The complaint also alleges that releasing Kovacic with the knowledge that he was "both mentally and physically impaired" constituted the requisite *mens rea* of "deliberate indifference" as required by *Doe*. [Dkt. No. 78 at 23]. As such, Plaintiffs have satisfied the first prong of the test against qualified immunity by sufficiently alleging custody, injury, and deliberate indifference in order to support a constitutional violation based on the "special relationship" theory.

To satisfy the second prong, Plaintiffs must allege that the act of releasing Kovacic in an intoxicated state at the gas station "was objectively unreasonable in light of the law that was clearly established at the time of the actions complained of." *Club Retro,* 568 F.3d at 194. As the doctrine was first recognized in 1989 by the Supreme Court in *Deshaney*, the "special relationship" theory was clearly established law at the time of the incident in August 2007, almost 20 years later. Also, as the Complaint is .full of factual allegations that Kovacic was severely impaired at the time of release and was a danger to himself and others, the Plaintiffs have sufficiently alleged that the release was "objectively unreasonable." The same facts alleged which allow the Plaintiffs to satisfy the "deliberate indifference" standard of the special relationship theory work to satisfy the "objectively unreasonable" standard of the test against qualified immunity. Thus, the second prong of the test against qualified immunity has been satisfied by the Complaint. With both prongs satisfied, the Plaintiffs

have successfully met their burden to show that the Officers are not entitled to dismissal of this claim on the basis of qualified immunity.

b. State-Created Danger

Plaintiffs also claim a Due Process violation under the "state-created danger" theory. Defendants' motion to dismiss this claims is based, not on insufficiency of pleading or qualified immunity, but on the ground that this theory is not recognized as a valid basis for a claim in the Fifth Circuit. Most recently, the Fifth Circuit has made clear: "[t]his Circuit has never expressly accepted the state-created danger theory that a due process violation can be found if a state created or increased the danger to the plaintiffs and acted with deliberate indifference." *Hale v. Bexar County*, No. 08-50820, 2009 WL 2222833, at *4 (5th Cir. July 27, 2009). *See also Rios v. City of Del Rio*, 444 F.3d 417, 422-23 (5th Cir. 2006) ("[N]either the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however, many times refused to allow recovery sought to be predicated thereunder."); *Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability"); *Morin v. Moore*, 309 F.3d 316, 321-24 (5th Cir. 2002); *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 313-14 (5th Cir. 2002).

Though the Fifth Circuit has not recognized the state-created danger theory, it has not been without opportunity to do so. When discussing the current state of the doctrine in the Fifth Circuit, a three judge panel, in *Breen v. Texas A&M Univ.*, noted that "a

number of courts, including a majority of the federal circuits have adopted the state-created danger theory of section 1983 liabiltiy," and that "this court discussed the theory in no fewer than eleven published decisions prior to [2003]." 485 F.3d 325, 333-34 (5th Cir. 2007) ("*Breen I*"). The Court in *Breen I* then addressed the question of whether the Fifth Circuit adopted the theory by its holding in *Scanlan v. Texas A&M Univ.*, 343 F.3d 533 (5th Cir. 2002). The Court acknowledged that "[s]ince the *Scanlan* decision, the panels in three subsequent, unrelated cases have issued opinions that contained statements suggesting that *Scanlan* did not adopt the state-created danger theory." *Breen I*, 485 F.3d. at 336 (citing *Rios v. City of Del Rio,* 444 F.3d 417, 422-23 (5th Cir.2006); *Beltran*, 367 F.3d at 307; *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 n.5 (5th Cir.2003)). Despite these cases to the contrary, the *Breen I* Court held that *Scanlan* did recognize the state-created danger theory, and that it is a valid basis for a claim in this Circuit. *Breen I*, 485 F.3d. at 337. However, the Fifth Circuit quickly stripped the opinion of all recognition of the theory by granting rehearing, *sua sponte*, and withdrawing the sections and footnotes of the opinion which held the theory valid. *Breen v. Texas A&M Univ.*, 494 F.3d 516, 518 (5th Cir. 2007) (*per curiam*) ("*Breen II*"). Thus, the "state-created danger" theory reverted to its previous state of invalidity in the Fifth Circuit.

After a review of the theory's recent treatment by the Court of Appeals, it is clear that the Fifth Circuit does not currently accept the state-created danger theory as a valid basis for Due Process violations. Accordingly, Defendants motion with respect to this claim must be granted and Plaintiffs' claims premised

on the state-created danger theory must be dismissed under Federal Rule of Procedure 12(b)(6).

B. Municipal Liability

Defendants also move to dismiss Plaintiffs' claim against the City under § 1983, on the ground that without a constitutional violation against the Officers due to their qualified immunity, the derivative claim for municipal liability must also be dismissed. [Dkt. No. 68 at 15]. However, as discussed in part II(A)(ii)(b), *supra*, Plaintiffs' claim against the Officers for a violation of Due Process under the "special relationship" theory has not been defeated by qualified immunity. Even if that were not the case, and the Officers were entitled to qualified immunity from all claims, Defendants still would not be entitled to a dismissal of the municipal liability claim. Qualified immunity is a defense to claims against state actors in their *individual capacities only*, and "the Supreme Court has upheld municipal liability for § 1983 violations notwithstanding the qualified immunity of the individual municipal defendants." *Babb v. Dorman*, 33 F.3d 472, 476 n.7 (5th Cir. 1994). *See Brummett v. Camble,* 946 F.2d 1178, 1182 (5th Cir.1991) (citing *Owen v. City of Independence,* 445 U.S. 622, 638 (1980)). *See also Hampton Co. Nat. Sur., LLC v. Tunica County*, 543 F.3d 221, 227 (5th Cir. 2008) ("Unlike in the determination of qualified immunity for the Sheriff, the County cannot rely on there being no clearly established right when the Sheriff acted. Instead, a county may be liable even when the property right had not been clearly known.") As the qualified immunity of the Officers in no way affects the municipal liability of the City, the former provides no grounds for the dismissal of the latter.

Accordingly, Defendants' motion to dismiss the municipal liability claim against the City under § 1983 must be denied.

III. CONCLUSION

For the above stated reasons, Defendants' motion to dismiss is GRANTED in part and DENIED in part:

GRANTED, in that Plaintiffs' claim against the Officers in their individual capacities for unreasonable seizure is hereby DISMISSED due to the Officer's qualified immunity. Also, Plaintiff's claims against all defendants for any due process violations under the "state-created danger" theory are hereby DISMISSED as the theory is not recognized as the basis for a claim in this Circuit.

DENIED, in that Plaintiffs' claims against the Officers in their individual capacities for a Due Process violation under the "special relationship" theory and Plaintiffs' claim against the City for municipal liability under § 1983 remain.

IT IS SO ORDERED.

Done this 22nd day of December, 2009, in Laredo, TX.

/s/ M. Alvarez
Micaela Alvarez
UNITED STATES DISTRICT JUDGE

TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-

PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10-40208

[Filed January 11, 2011]

DAN KOVACIC, Individually, and With An Interest in the Estate of Zachary Kovacic, Deceased; ELIZABETH FOX, Individually, and With An Interest in the Estate of Zachary Kovacic, Deceased; ERIN MICHELLE KOVACIC, Individually, and As Next Friend of Carley Nicole Kovacic, Both With An Interest in the Estate of Zachary Kovacic, Deceased, CARLEY NICOLE KOVACIC, Minor Child With an Interest in the Estate of Zachary Kovacic, Deceased,

Plaintiffs-Appellees

v.

JUAN VILLARREAL, Individually, and In His Official Capacity; JOSE D. RUBIO, Individually, and In His Official Capacity,

Defendants-Appellants

Appeal from the United States District Court for the Southern District of Texas, Laredo

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ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____, F.3d _____)

Before Circuit Judges KING, GARWOOD, and DAVIS.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Will Garwood
United States Circuit Judge

Order on pet EB treat as pan reh-REHG6A